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No. 78-1183

IN THE

Supreme Court of the United States

October Term, 1978

CARBON FUEL COMPANY,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT 17, UNITED MINE WORKERS
OF AMERICA; AND LOCAL UNIONS NOS.
6572, 7626 AND 2236, UNITED MINE
WORKERS OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), having failed to secure the consent of all parties to the above noted case, hereby moves for leave to file a brief *amicus curiae* in support of the respondents' position.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 104 national and international unions having a total membership of approximately 13,750,000 working men and women. These unions devote

their main energies to the practice and procedure of collective bargaining including the consummation of collective agreements. This case concerns the proper construction of the arbitration and no strike clauses that are common in such agreements. Accordingly, this proceeding is of substantial moment to the AFL-CIO and its affiliates.

ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF

The parties, quite properly, will concentrate on the particular collective agreement involved and its bargaining background. In contrast the brief sought to be filed is devoted to two more general propositions of law central to the question presented: First, that the national labor policy does not include a Congressional determination that unions are to police unauthorized breach of contract strikes generally, or such strikes over arbitrable disputes in particular. Second, that the policy of free collective bargaining confines the courts' authority to imply contractual duties to instances in which the implied obligation does not add to the express undertakings in the agreement but rather is inherent those undertakings fairly understood.

CONCLUSION

For the above stated reasons this motion should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:

Boys Markets v. *Retail Clerks*, 398 U.S. 235 ..... 19, 22
Carpenters' Union v. *Labor Board*, 362 U.S. 411 .. 3
Coronado Coal Co. v. *United Mine Workers*, 268 U.S. 295 ..... 5, 6, 13
Eazor Express, Inc. v. *International Brotherhood of Teamsters, et al.*, 520 F.2d 951 (C.A. 3), cert. denied, 424 U.S. 935 .... 11, 12, 13, 21, 22, 23, 24, 25, 27
Florida Power and Light Co. v. *Electrical Workers*, 268 U.S. 295 ..... 3, 10
Gateway Coal Co. v. *Mine Workers*, 414 U.S. 368 .. 20
Howard Johnson v. *Hotel Employees*, 417 U.S. 249 ..... 2, 15, 16, 28
Labor Board v. *Dorsey Trailers, Inc.*, 179 F.2d 589 (C.A. 5) 18
Labor Board v. *Drivers Union*, 362 U.S. 274 7
Labor Board v. *General Motors*, 373 U.S. 734 ... 8
Labor Board v. *Sands Mfg. Co.*, 306 U.S. 332 .... 7, 8
Labor Board v. *Sunset Minerals*, 211 F.2d 225 (C.A. 9) 18
Lewis v. *Benedict Coal Corp.*, 259 F.2d 346 (C.A. 6) Affirmed in part and modified in part 361 U.S. 459 ..... 18, 23
Local 25, Teamsters Union v. *W. L. Mead, Inc.*, 230 F.2d 576 (C.A. 1) 18
Local 1251, etc. v. *Robertshaw Controls Co.*, 405 F.2d 29 (en banc) (C.A. 2) 17

page

Machinists v. *Labor Board*, 362 U.S. 411 ..... 3, 6
Mastro Plastics Corp. v. *Labor Board*, 350 U.S. 270 8
NLRB v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 .. 8
NLRB v. *Burns Security Services*, 406 U.S. 281 .. 15, 16
NLRB v. *C & C Plywood Co.*, 385 U.S. 421 27
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 15, 28
Oddie v. *Ross Gear & Tool Co.*, 305 F.2d 143 (C.A. 6) 16
Penn Packing Co., Inc. v. *Amalgamated Meat Cutters, Local 195*, 497 F.2d 888 (C.A. 3) 24
Pipefitters v. *United States*, 407 U.S. 385 3
Porter Co. v. *NLRB*, 397 U.S. 99 ..... 13, 15
Radio Officers v. *Labor Board*, 347 U.S. 17 8
Republic Steel Corp. v. *U.M.W. of America*, 570 F.2d 467 (C.A. 3) 27
Scofield v. *NLRB*, 394 U.S. 423 8
Sinclair Oil Corp. v. *Oil, Chemical and Atomic Workers International Union*, 452 F.2d 49 (C.A. 7) 22
Steelworkers v. *Warrior & Gulf Co.*, 363 U.S. 574 ..... 18, 19, 20
Teamsters Union v. *Lucas Flour*, 369 U.S. 95 ..16, 17, 18, 19, 20, 26
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 .. 2, 10, 18
United Construction Workers v. *Haislip Baking Co.*, 223 F.2d 872 (C.A. 4) cert. denied 350 U.S. 892 ..... 7, 11, 18, 23, 24, 26, 27
United Mine Workers v. *Coronado Coal Co.*, 259 U.S. 344 ..... 5, 6, 13
United States v. *International Union U.M.W.A.*, 77 F.Supp. 563 (D.C.D.C.) 11
United States v. *Railroad Trainmen*, 27 LRRM 2308 23

page

Wood v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 ..... 2, 20
Zdanok v. *Glidden Co.*, 288 F.2d 99 (C.A. 6), affirmed on another issue, 375 U.S. 530 ..... 16, 17

Statutes:

Labor-Management Relations Act of 1947, as amended (61 Stat. 136, *et seq*).
§ 203(d) 20
§ 204 20
§ 301 ..... 4, 7, 20, 26
§ 301(a) 4, 5
§ 301(b) 5, 12, 22, 23
§ 301(c) 5
§ 301(d) 5
§ 301(e) 5, 6, 12, 13, 23, 24

Labor-Management Reporting and Disclosure Act of 1959, § 101(a)(5) 10, 25

National Labor Relations Act, as amended
§ 2(2) 6
§ 7 ..... 7, 22
§ 8(d) 15, 16
§ 13 ..... 7, 26
§ 14(b) 10

Norris-LaGuardia Act, § 6 ..... 7, 10

Congressional Materials:

Legislative Histories of Labor-Management Relations Act of 1947 (G.P.O. 1948) 4, 5, 6, 7, 8, 12, 19

Miscellaneous:

Cox, Some Aspects of the Labor-Management Realtions Act of 1947, 61 Harv.L.Rev. 1 (1947) ... 8, 9
(Note) 89 Harv.L.Rev. 601 (1976) 25
Spelfogel, "Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions," 25 Lab. L.J. 592 (1973) 26

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Carbon Fuel contends: "A union bound by a collective bargaining agreement containing an express or implied no-strike clause has the obligation without more, to use all reasonable means to prevent and end strikes by its members and subordinate branches in violation of that

clause." (Pet. Br. 20 (Heading).) This statement leaves no doubt that the "obligation" sought to be imposed is, in Professor Corbin's instructive dichotomy, not "implied in fact"—*viz.* "found by interpretation of a promisor's words or conduct"—but " 'implied in law' * * * [—*viz.* a] legal duty created otherwise than by assent and without any words or conduct that are interpreted as promissory." (3 Corbin, Contracts, § 561.)

The courts' authority in enforcing a collective agreement to create such an implied obligation is a matter of "federal law * * * fashion[ed] from the policy of our national labor law" (*Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456). That policy does not, as we show in part A of our argument, include a Congressional determination that unions are to police unauthorized breach of contract strikes generally, or such strikes over arbitrable disputes in particular. Moreover, as we show in part B, *Howard Johnson* v. *Hotel Employees,* 417 U.S. 249, demonstrates that the policy of free collective bargaining confines the authority to imply contractual duties to instances in which the implied obligation does not add to the express undertakings in the agreement but rather is inherent in those undertakings fairly understood—*viz.* to instances in which the express promise is " 'instinct with an obligation' imperfectly expressed." (*Wood* v. *Lucy, Lady Duff-Gordon,* 222 N.Y. 88, 90, 118 N.E. 214 (Cardozo, J.).)

ARGUMENT

(A). The petitioner argues that where a collective agreement contains an arbitration or no-strike clause, "the policy of our national labor law" (*Textile Workers* v. *Lincoln Mills,* 353 U.S. 448,456) mandates an obligation implied in

law on the union to use all reasonable means to end unauthorized strikes in violation of the agreement. The petitioner misunderstands the national labor policy.

This Court has recognized that the 1947 Congress in enacting the Labor-Management Relations Act sought to promote numerous policies, and that the legislature did not push any of these to the limits of its own logic—partly because to do so would have undermined competing policies and partly because the dynamics of the legislative process in the face of a predictable Presidential veto necessitated compromise. (See, *e.g., Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 99-100; *Machinists* v. *Labor Board,* 362 U.S. 411 n. 7, 428; *Pipefitters* v. *United States,* 407 U.S. 385, 409; *Florida Power and Light Co.* v. *Electrical Workers,* 417 U.S. 790.) A particularly valuable statement is that of Mr. Justice Harlan in *Machinists, supra,* 362 U.S. at 428:

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it.

It is essential therefore to identify the means which Congress chose to prevent and remedy strikes in breach of contract and also to consider whether the implication of a contractual duty on unions to utilize all reasonable means to end a work stoppage which it has not authorized, participated in or ratified conflicts with other policies which Congress sought to effectuate. Accordingly, we now show that Congress devoted careful attention to the problem of strikes during the term of collective agreements, and in the Taft-

Hartley Act adopted methods for avoiding such strikes which do not include creation of such a contractual duty.

(1) The first and most important provision adopted by Congress in order to maintain industrial peace during the term of a collective agreement is, of course, § 301(a), which provides that such agreements shall be judicially enforceable. The Court's opinion in *Lincoln Mills, supra,* 353 U.S. at 453-454 sets out in full the pertinent discussion in the Senate[1] and House Reports.[2] The passages from the Senate Report relied on by petitioner and its supporting *amici curiae* state that the adoption of a no-strike clause is highly desirable, and that if collective agreements are to "stabilize industrial relations" they must be enforceable aganst both employers and unions; but these universally acknowledged propositions do not significantly advance their position. And the concluding paragraph of this section of the Senate Report (entitled "Enforcement of Contract Responsibilities"[3]) makes clear that Congress' intent was to *encourage* but *not to mandate* the adoption of no-strike agreements:

> Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.
>
> It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.
>
> This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.
>
> *In any event, it is certainly a point to be bargained over* and any union with the status of "representative" under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious.[4]

To effectuate § 301(a), Taft-Hartley declared in § 301(b) that any (covered) union "shall be bound by the acts of its agents" and "may sue or be sued as entity"; in §§ 301(c) and (d) provided for venue and process in such suits; and in § 301(e) provided also that the common law of agency shall govern "in determining whether one person is acting as an 'agent' for another person". By subjecting labor organizations to suit as entities and by applying to them the common law doctrine of *respondeat superior* just as if they were corporations, Congress determined that contractual obligations of labor organizations were to be enforceable against unions according to the principles laid down by Chief Justice Taft in the *Coronado Coal* cases:

> In our previous opinion we held that a trades union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds

[1] S. Rep. No. 105, S. 1126, 80 Cong., 1st Sess., 15-18 (hereinafter cited as S. Rep.) I Legislative History of the Labor Management Relations Act, 1947, pp. 421-424 (hereafter cited as Leg. Hist.).

[2] H. Rep. No. 245, 80th Cong., 1st Sess., p. 6, I Leg. Hist. 297.

[3] S. Rep. 15, I Leg. Hist. 421.

[4] S. Rep. 17-18, I Leg. Hist. 423-424, emphasis added. The quotation at Chamber of Commerce Br. 11 elides the emphasized portion.

> raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them on; but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.[5]

But Congress did not take the more drastic step of imposing vicarious liability on unions for acts that under common law principles are unauthorized. In explaining § 301(e) (and the parallel § 2(13) in Title I of the bill (dealing with unfair labor practices)), Senator Taft said:

> What is a labor organization? It is an organization with officers, exactly like a corporation.
>
> I admit it may be difficult to prove the responsibility of a union. It is sometimes difficult to prove in the case of an employer. If the wife of a man who is working at a plant receives a lot of telephone messages, very likely it cannot be proved that they came from the union. There is no case then. There must be legal proof of agency in the case of unions as in the case of corporations; * * *.[6]

This treatment of the problem of vicarious responsibility provides an excellent example of Congress' "adjustment and compromise of competing interests which in the abstract * * * may seem irreconcilable." (*Machinists, supra.*) On the one hand, Congress wanted to do away with the very loose test of responsibility under §2(2) of the original NLRA whereby the term "employer" included "any person acting in the interest of an employer"; Congress

[5] *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 304-305.

[6] 93 Cong. Rec. 4022, II Leg. Hist., 1926. Compare Chief Justice Taft in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395.

also wanted to alleviate the difficulties of establishing union responsibility under § 6 of the Norris-LaGuardia Act which requires proof of "actual instigation, participation or ratification".[7] Congress resolved this problem by uniformly adopting the common law test of agency as the measure of both union and employer responsibility.[8]

(2) Thus, § 301 imposes on unions liability for strikes in breach of contract for which they are responsible according to the common law rule of agency—that is, strikes which they have authorized, participated in or ratified. Congress did not thereby leave employers without remedy for unauthorized strikes. Taft-Hartley dealt with this problem not by imposing liability upon unions, but by making clear the *employer's* authority against the employees who engaged in that unauthorized activity. The 1947 amendments explicitly affirmed the common law right of the employer to discharge (or otherwise discipline) an employee who engages in a strike in breach of contract. This was accomplished by an amendment to § 13 of the NLRA preserving "the limitations or qualifications on [the] right" to strike.[9] One of these "limitations or qualifications" is the rule of *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, 344 that the NLRA does not prohibit an effective discharge for "repudiation by the employe of his agreement," any more than it prohibits such discharge for a tort committed against the employer. Likewise, in discussing § 7 of the Act the conferees declared their emphatic approval of the *Sands* case and

[7] 93 Cong. 6858, II Leg. Hist., 1622.

[8] See particularly Senator Taft's explanation of the conference agreement, 93 Cong. Rec. 6858, II Leg. Hist., 1622 which is quoted in full *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 878-879 (C.A. 4), *cert. denied*, 350 U.S. 847.

[9] See *Labor Board* v. *Drivers Union*, 362 U.S. 274, 281.

of two then recent Labor Board cases which expanded upon *Sands*.[10]

(3) At the same time that Congress was reaffirming the authority of employers to discipline workers who engage in strikes in breach of contract, it reduced the effective authority of unions over these employees. As stated in *Radio Officers* v. *Labor Board*, 347 U.S. 17, 40-41, "the policy of the Act is to insulate employees' jobs from their organizational rights" by "withholding from unions the power to cause the discharge of employees for any other reason" than to compel payment of union dues and fees. Thus, "§§ 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2) and 8(a)(3) form a web, of which § 8(b(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." [11]

These restrictions on unions were adopted in response to the strong feeling of the proponents of the 1947 amendments that union officials had obtained too much power over their rank and file members and over employees generally. In describing "the philosophy" on which the 1947 changes in the NLRA were based, Professor Cox wrote:

> Doubtless one reason for the violence of reaction of organized labor to the Taft-Hartley amendments is the realization that they are rooted in the view that union and employees are not one.[12]

[10] See Sen. Taft's summary of the conference agreement, 93 Cong. Rec. 6442, II Leg. Hist., pp. 1538-1539; House Conf. Report No. 510 on H.R. 3020, 38-39, I Leg. Hist., 542-543; see also *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 280 and *id.* at n. 10.

[11] *Scofield* v. *NLRB*, 394 U.S. 423, 428-429. See also *Labor Board* v. *General Motors*, 373 U.S. 734, 742-743; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184-185.

[12] Cox, *Some Aspects of the Labor Management Relations Act of 1947*, 61 Harv. L. Rev. 1, 45, 47 (1947).

And in the concluding portion of the same article Professor Cox accurately prophesied the effect of this enactment on the problem of unauthorized strikes:

> The most disturbing aspect of Section 8(a)(3), however, is the provision making it an unfair labor practice to discharge an employee pursuant to an authorized union shop agreement for any reason other than non-payment of dues. By depriving the majority representative of power to expel from the plant individuals seeking to undermine its position, this provision encourages the growth of the dissident groups and dual unionism that breed jurisdictional strife. By depriving the union of its most effective means of disciplining workers who disregard their obligations under a collective agreement, the provision also disables the union from accepting responsibility for the employees' observance of the other terms of a collective agreement. For example, under a true union shop arrangement, a labor union could take effective action to halt wildcat strikes. It could order the men back to work and, if they disobeyed, suspend or expel them, thus bringing about their lay-off or discharge. *Under Sections 8(a)(3) the back-to-work order would be an empty gesture, for the union would have no effective sanction by which it could be enforced.* Under such circumstances it is unlikely that unions will voluntarily accept any responsibility for the conduct of the employees they represent.[13]

Congress further disabled unions from policing no-strike provisions against the employees by restricting their ability to insist on their becoming and remaining union members. The union has no control whatever over employees who are not its members. And the Act does not require those repre-

[13] Cox, *Some Aspects of the Labor-Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 298-299 (1948) (emphasis added).

sented to become members of the representative; it merely permits unions to bargain with the employer for an agreement whereunder the employees are required to pay union dues and other fees. Further § 14(b), also adopted in 1947, forbids unions from even bargaining for such a provision in states where this is contrary to law.[14]

(4) The foregoing description of what Congress did and did not do in 1947 makes clear that while the legislature was "interested in promoting collective bargaining that ended with agreements not to strike" [15] the problem of unauthorized strikes was dealt with not by establishing a contractual duty of unions to end such strikes "but through a completely different legislative route".[16]

The mutual obligations of the parties to collective agreements were to be strengthened by making such agreements enforceable in federal court and by providing that unions could both sue and be sued as entities. Unions were to be "bound by the acts of their agents", applying common law rules of agency which take the middle ground between the standards of the Wagner Act and of § 6 of the Norris-LaGuardia Act. The close interrelationships between these provisions precludes attributing to Congress an intent to impose liability for a breach of a

[14] Subsequent legislation has gone even further in limiting union authority. For when Congress, in 1959 undertook the regulation of the internal affairs of labor organizations—a step it had declined to take in 1947—it established *inter alia* that a member may not be disciplined without a prior hearing. Labor Management Reporting and Disclosure Act of 1959, § 101(a)(5), 29 U.S.C. § 411(a)(5).

[15] *Lincoln Mills, supra,* 353 U.S. at 452.

[16] Cf. *Florida Power & Light Co.* v. *Electrical Workers,* 417 U.S. 790, 807.

no-strike promise on a union which has not been found responsible therefore under common law agency principles.

Further, unauthorized strikes were to be deterred and remedied by vindicating the employer's authority to discharge or discipline the employees who are guilty of the breach. That Congress looked to the *employer* to protect himself in this manner, rather than to the disciplinary authority of the union that is party to the agreement is left beyond doubt by Congress' simultaneous action in disabling unions from compelling an employee's discharge except for nonpayment of dues thereby removing their effective power over employees.

Accordingly in *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872 (C.A. 4), *cert. denied,* 350 U.S. 892, Chief Judge Parker both confirmed the employers' right to discharge "wild cat" strikers, and held that the unions' liability for such strikes depends not on "whether they did everything they might have done but [on] whether they adopted, encouraged or prolonged the continuance of the strike" (*id.* at 877-878).[17]

[17] The Court of Appeals affirmed the judgment against the defendant locals on the theory that "all of the members of the defendant locals, including their officers, participated in the strikes * * *" (582 F.2d 1346, 1350). In so ruling, that court expressed approval (*id.* at 1349) of a "mass action theory of responsibility" which originated in *United States* v. *International Union, U.M.W.A.,* 77 F.Supp. 563 (D.C.D.C.) and which was an alternative ground for imposing liability on the defendants in *Eazor Express Inc.* v. *International Brotherhood of Teamsters, et al.,* 520 F.2d 951 (C.A.3), *cert. denied,* 424 U.S. 935. It should be noted that the Fourth Circuit's conclusion that the theory is sound only when "properly applied"—which apparently means, where, as here all the members of the union participate in the illegal strike—is a substantial modification of the *Eazor* court's decision which im-

(B) (1). What has been said thus far demonstrates, we believe, that there is no basis for the petitioner's contention

posed liability on a "mass action theory" where the strike engaged in by "all members of a union *employed by a given employer*" (520 F.2d at 963, emphasis added). In *Eazor* this meant that only 200 of one Local's approximately 10,000 members and 355 of the other Local's approximately 6,500 members subjected their unions' treasury to judgments of $655,793 and $366,786 respectively; and that 1/40 of 1% of the IBT's total membership subjected the IBT to a judgment of over one million dollars. Because no party has sought review of the "mass action" aspect of the ruling below, it is not presently before the Court, and we anticipate that the Court will not address itself to that issue. However, out of an abundance of caution, due to the importance of the issue, we shall state briefly why we believe that the "mass action theory" is fundamentally inconsistent with the statute as a basis for imputing liability to a labor organization, certainly as stated in *Eazor* and perhaps as applied below in this case.

The controlling legislative materials are those which we have already discussed, namely §§ 301(b) and (e) wherein Congress determined that unions would be liable only for the acts of their "agents" according to the common law. (See pp. 5-7, *supra*.) Senator Taft twice gave the most explicit assurance possible that union's would not be held responsible for the actions of their members. See 93 Cong. Rec. 4022, II Leg. Hist. 1026-1027 quoted at p. 6, *supra;* 93 Cong. Rec. 5214, II Leg. Hist. 1204-1205.

> I think the word "agent" used here, as used in the contract section, and as used in other places in the bill, means an agent under the ordinary rules of agency, an agent of the labor union, the organization, as such. The fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent.

The foregoing leaves no room under the LMRA for imposing liability on unions on the "premise" that "large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." (*Eazor*, *supra*, 520 F.2d at 963.) Even if it is to be accepted as an immutable truth, subject to judicial notice, that men do not act without leaders, it is still a matter of proof wheher in a particular

that the 1947 Congress expected unions to end unauthorized breach of contract strikes. But even if there were room for disagreement on that point it would *not* follow that such an obligation may properly be implied in law from an arbitration or no-strike clause. For the policy of free collective bargaining imposes narrow limits on the courts' power to make such implications. That policy originated in the Wagner Act and was emphatically reaffirmed in § 8(d) of the 1947 Amendments. This history was fully and authoratitively detailed by Mr. Justice Black in *Porter Co.* v. *NLRB*, 397 U.S. 99, 104-106; (footnotes omitted; emphasis supplied.)

> The object of [the Wagner] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the

work stoppage those leaders are the officers and agents chosen and authorized to act by the union *rather than ad hoc leaders whose illegal acts generated a spontaneous following among the men.* Only for the acts of the former has Congress subjected unions as entities to liability. Neither the *Eazor* court nor any of the other courts which have adopted the "mass action" theory has mentioned § 301(e), or Senator Taft's explanation thereof; they did not even stop to consider whether by its action Congress has withdrawn from the courts the authority to impose liability on some judicially created theory. These courts have also disregarded the federal law of agency as declared in the *Coronado* cases, see pp. 5-6, *supra*. While it presents a much closer question than that presented in *Eazor*, even the spontaneous illegal action of *all* the members of an organization is not action of that organization's "agents in accordance with their fundamental agreement of association" (*Coronado, supra*, 268 U.S. at 304) and should not be a basis for liability of the organization which, as an institution, has a separate existence from those who are its members *at any given time.*

passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agrement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:

> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."

The discussions on the floor of Congress consistently reflect this same understanding. * * * In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court said:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *Id.*, at 45.

In 1947 Congress reviewed the experience under the Act and concluded that certain amendments were in order. In the House committee report accompanying what eventually became the Labor Management Relations Act, 1947, the committee referred to the abovedquoted language in *Jones & Laughlin* and said:

> "Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . .
>
> "[U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements."

Accordingly Congress amended the provisions defining unfair labor practices and said in § 8(d) that:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*"

Porter was followed in *NLRB* v. *Burns Security Services*, 406 U.S. 281-284, 287. The Court there observed that § 8(d) made the policy ennunciated in *Jones & Laughlin, supra*, "an express statutory mandate" (406 U.S. at 283). And *Howard Johnson* v. *Hotel Employees*, 417 U.S. 249 in turn followed *Porter* and *Burns*. The *Howard Johnson* Court

met and rejected the contention that § 8(d) (and thus the rule of the *Burns* case) was applicable only to the NLRB:

> Although this distinction was in fact suggested by the Court's opinion in *Burns, we do not believe that the fundamental policies outlined in Burns can be so lightly disregarded.* In *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements.*[18]

Howard Johnson thus teaches that courts must be circumspect in defining obligations under a collective agreement lest they subvert the fundamental policy of free collective bargaining.[19]

(2) Such judicial restraint is entirely consistent with the rule of *Teamsters Union* v. *Lucas Flour,* 369 U.S. 95. In that case the parties entered into a collective agreement containing an arbitration clause, an arbitrable dispute thereafter arose and the union struck over that grievance. The Court posed the issue as follows:

> Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.[20]

The Court observed that:

> In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. *W. L. Mead,*

[18] 417 U.S. at 255, emphasis added.

[19] Likewise instructive is the line of cases which deal with the question whether seniority rights under a collective bargaining agreement which covers employees at a particular plant survive and can be transferred when that plant is shut down but the employer continues the same operations at a different plant. In *Zdanok* v. *Glidden Co.,* 288 F.2d 99 (1961), affirmed on another issue, 370 U.S. 530 (1962), the Second Circuit held that such an obligation does survive. But the *Glidden* decision was strongly criticized, and when it was first invoked as precedent in *Oddie* v. *Ross Gear & Tool Co.,* 305 F.2d 143 (1962), the Sixth Circuit expressly declined to follow it, saying in part, "we must construe the contract as it is written, rather than make a new contract for the parties" (*id.* at 148). Ultimately, the Second Circuit itself unanimously overruled *Glidden* in *Local 1251, etc.* v. *Robertshaw Controls Co.,* 405 F.2d 29, 33 *(en banc)*:

> The *Glidden* opinion stated that the court was "adopting the more rational, not to say humane, construction" of the agreement and that another construction "would be irrational and destructive." 288 F.2d at 104. However, as Chief Judge Lumbard said in his dissent in *Glidden*:
>
> > "We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms." 288 F.2d at 105.
>
> Those few who have applauded the decision have not attempted to justify it in terms of contract analysis. Rather they have sought to defend the result upon the basis of equitable considerations or of national labor policy. The sources of these policies and equities are obscure and there is the gravest doubt of the power of the federal courts to apply them in derogation of the contract of the parties.

[20] 369 U.S. at 105.

Inc., 113 NLRB 1040. We approve that doctrine.[21]

And the Court concluded:

> The grievance over which the union struck was, as it concedes, one which it had expressly agreed to settle by submission to final and binding arbitration procedings. The strike which it called was a violation of that contractual obligation.[22]

In *Haislip*, which was cited with approval on this point in *Lucas Flour*, the Court of Appeals made the same point:

> [W]e think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause the disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach.

The lower court and Board cases cited in *Lucas Flour* and the Court's conclusion there reflect the understanding first stated in *Lincoln Mills, supra*, that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."[23] Thus, the *Lucas Flour* rule rests on

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[21] 369 U.S. at 105, footnote omitted.

The Court cited: *Local 25, Teamsters Union* v. *W. L. Mead, Inc.*, 230 F.2d 576, 583-584 (C.A.1); *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 876-877 (C.A.4); *Labor Board* v. *Dorsey Trailers, Inc.*, 179 F.2d 589, 592 (C.A.5); *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (C.A.6); *Labor Board* v. *Sunset Minerals*, 211 F.2d 224 (C.A.9).

[22] 369 U.S. at 106.

[23] 353 U.S. at 455. See also *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582: "[T]he parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs."

the uniform understanding that a promise to arbitrate is not simply an agreement to submit a dispute to a particular tribunal but an undertaking to "substitute [arbitration] for industrial strife."[24] In those cases then the promise not to strike was implied *in fact* from the express promise to arbitrate fairly read in light of settled legal principles.

The approach to contract interpretation of the *Lucas Flour* Court is further illuminated by recalling the limitations which the Court itself placed on its holding:

> What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration. Nor is it to suggest that there may not arise problems in specific cases as to whether compulsory and binding arbitration has been agreed upon, and, if so, as to what disputes have been made arbitrable.[25]

The Court said also:

> Deciding the case as we do upon this explicit ground, we do not adopt the reasoning of the Washington court. Insofar as the language of that court's opinion is susceptible to the construction that a strike during the term of a collective bargaining agreement is *ipso facto* a violation of the agreement, we explicitly reject it.[26]

In this, the *Lucas Flour* opinion follows the intent of the Senate Report on Taft-Hartley that the adoption of a no-

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[24] *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578. As later stated in *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 249, "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures."

[25] 369 U.S. at 106.

[26] *Id.* at 105, n.14.

strike promise "is certainly a point to be bargained over", (see p. 5, *supra*). Just so, while § 203(d) of the Act expresses a policy favoring that resolution of grievance disputes by arbitration or similar agreed upon dispute mechanisms, and this policy is given weight in interpreting the scope and effect of arbitration provisions, this Court has left no doubt that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[27] These related holdings were summarized in *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 382:

> Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties.

(3) In short, the result reached in *Lucas Flour* is based on the application to suits under § 301 of a traditional contract principle: The Court determined that the promise to submit disputes to final and binding arbitration is "instinct with an obligation imperfectly expressed" not to strike over such disputes. (Cardozo, J. in *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90, 118 N.E. 214). That principle would provide a legal basis for the theory of relief here, if it were true that, as petitioner argues, a no-strike promise would be "illusory unless it is construed to contain a promise to use all reasonable means to prevent and terminate [unauthorized] strikes" (Pet. Br. 26). According to petitioner, "a construction of the contracts here to permit the International to relieve itself of its obligations simply by

[27] *Warrior & Gulf, supra*, 363 U.S. at 582. It is for this reason that the petitioners' strained and entirely novel reading of § 204 of the Act (Pet. Br. 21-22), even if correct avails it nothing.

delegating them to its Locals would effectively render the 'no-strike' promise illusory." (Pet. Br. 27.) But petitioner is mistaken when it states that the International has delegated any of its obligations to its locals. That assertion is merely a rephrasing of petitioner's prior assertion, likewise unsupported by any reference to the record, "The performance of its obligations to resolve disputes not natural in character was assigned to its districts and locals, here the District and the Locals." (Pet. Br. 26.) In fact, the contracts did *not* impose the obligation "to resolve disputes not national in character" on the International; rather the obligation was "assigned to its District and Locals" *by the contracts themselves.* (A. 175-176, 182-183; see also the description of the grievance procedure at Pet. Br. 8-9.) Thus, while we readily accept the proposition "that the mere assignment of an obligation under a contract does not relieve the original obligor of responsibility for its performance" (Pet. Br. 26), that principle is simply inapplicable under the terms of the contracts in this case.

Petitioner also adopts a portion of the opinion of the Third Circuit in *Eazor Express, Inc.* v. *International Brotherhood of Teamsters, etc.*, 520 F.2d 951, 959-960 (C.A. 3), *cert. denied*, 424 U.S. 935 where that court stated as a general proposition that implication of a duty to exert all reasonable means to end an unauthorized strike is necessary lest the no-strike promise in the agreement be rendered "illusionary". We submit that the *Eazor* court was wrong.

Far from being "illusory", a "no-strike" promise gives the employer two very substantial benefits: *First*, he obtains a promise, enforceable against the union, that the union will not authorize, encourage or prolong a strike by the actions of its agents. This protects the employer in all

situations except those where there is a spontaneous work stoppage or one which is led by individuals who are not agents of the union. Employers have obtained substantial damage judgments against unions for authorized breach-of-contract strikes. And, since *Boys Markets* v. *Retail Clerks*, 398 U.S. 235 employers can obtain injunctions against strikes over an arbitrable grievance. *Second*, and in all cases, the employer obtains the right to discharge or otherwise discipline the strikers, whose concerted activity would otherwise be protected by § 7 of the NLRA. (See pp. 7-8, *supra*.)

In another portion of the opinion (that dealing with damages) the *Eazor* court said that a failure to require the unions not to utilize all the means available to them for ending an unauthorized strike,

> would make a hollow mockery of the unions no-strike pledge and would leave the plaintiffs without any remedy in damages if, as it has been held, the individual union members are not answerable in damages for illegal strike activity. *Sinclair Oil Corp* v. *Oil, Chemical and Atomic Workers International Union*, 7 Cir. 1971, 452 F.2d 49.[28]

The cited *Oil Workers* decision drew the conclusion that employees may not be sued for damages for engaging in unauthorized strikes from a thorough examination of § 301 (b). We believe that this construction is correct, but submit that the fact that Congress has established an immunity for one class of defendants is no basis for imposing a liability on some other potential defendant just so the plaintiff may

[28] 520 F.2d at 967.

recover damages from *someone*.[29] Congress' adoption of § 301(b) did not disable the legislature from also adopting § 301(e), thereby making unions liable for the acts of their agents rather than a provision making unions liable for the unauthorized acts of members. And the courts, of course, cannot rewrite Taft-Hartley to achieve the latter result because they believe employers should collect damages for unauthorized strikes. Yet in *Eazor*, the District Court said,

> Moreover, realistically, in the absence of such an implied obligation, without intending to impugn the integrities of any of the unions involved in this action, the way is clear for a union to furtively call for or encourage an activity while publicly disavowing it. [357 F.Supp. 158, 165, n. 12.]

This exercise in realism is misplaced. Congress was conscious that proof of agency would sometimes be difficult to establish, but nevertheless adopted the common law test of agency rather than some other standard (like that in the original Wagner Act) which would have made it easier to impute liability to an alleged principle. (See pp. 5-7, *supra*.) The District Court's reasoning circumvents that legislative determination by implying in law an obligation never under-

[29] On the basis of this reasoning, and the court's view (which we discuss at pp. 24-26 hereof) that it was "highly probable that the unions could have ended the strikes promptly" (520 F.2d at 967), the *Eazor* court relieved the plaintiff employer of the need for establishing that the strike losses which is recovered were proximately caused by the union's breach of the duty whose existence it had implied.

In *Oil Workers* the Seventh Circuit left the present question open, contrasting *U.S.* v. *Railroad Trainmen*, 27 LRRM 2308 (which held a union in contempt of an injunction) with *Haislip, supra* and *Lewis* v. *Benedict Coal Corp.*, 259 F.2d at 346 (C.A. 6), affirmed in part and modified in part, 361 U.S. 459 (see 452 F.2d at 54, n.10).

taken where sufficient proof of agency is unavailable.[30]

The practical judgment of management representatives that these benefits are substantial—as opposed to their advocacy position that they are not—is reflected by the prevalence of no-strike clauses, and the almost universal insistence thereon by employers in the many years before the *Eazor* court implied therefrom the additional union duty to police unauthorized strikes.[31] Yet these practical realities which make the no-strike promise so valuable

[30] While this would be improper even if Congress' judgment is thought to be unrealistic, it may not be amiss to observe that triers of fact are not unsophisticated in detecting possible subterfuges. See, for example, *Benedict Coal*, *supra*, 259 F.2d at 351-352, where the jury, properly instructed under § 301(e), found a union responsible under circumstances like those which troubled the District Court in *Eazor*.

[31] *Eazor* was decided in 1975, 20 years after *Haislip* declared that no such duty exists unless expressly undertaken and 28 years after Taft-Hartley was enacted. The only case cited by the *Eazor* court as establishing such a duty, *Penn Packing Co., Inc.* v. *Amalgamated Meat Cuters, Local 195*, 497 F.2d 888, 891 (C.A.3) was decided in 1974. Actually, the *Eazor* court's reliance on that case (520 F.2d at 960) was entirely misplaced because the *Penn Packing* agreement provided, "The Union for itself *and for its individual members* agrees and *guarantees* that there shall be *no* strike, stoppage of work, slowdown, or other interference with production." Thus that case is not one in which the court created an implied duty never actually agreed to but one based on the express terms of the contract which provided a no-strike "guarantee" by the unions for itself and "its individual members." Indeed, in construing this "guarantee" the *Penn Packing* court held that "the union did not agree to pay for any loss to the employer from an unauthorized strike but did commit itself to use its best efforts to end the stoppage as soon as practicable." Thus, that court read the contract narrowly not as a basis to create obligations never anticipated by the parties.

to employers are totally ignored in the *Eazor* opinion and by petitioner here.[32]

[32] The *Eazor* court found the unions liable because they had not brought to bear against the strikers "the arsenal of powerful measures available to" them. (520 F.2d at 966-967.) That court did not consider that in 1947 Congress had depleted that arsenal by forbidding unions from insisting upon the discharge of employees whom they had expelled and had left only the employers with the heavy hardware—the power to deprive strikers of their jobs. Moreover, in stressing the unions' authority under their constitution to place in trusteeship a local which was unable to put an end to a "wild cat" strike, that court paid no heed to the limitations of that course. In those instances where only a fraction of the members of the local were involved in the "wild cat" strike (as in *Eazor* itself, see pp. 11-12, *supra*), the imposition of a trusteeship would be unfair to the non-striking members by depriving them of local autonomy without any fault on their part. And in a case like the present where all the members of a local (or locals) are involved in the illegal strike, the imposition of a trusteeship or the lesser measure of removing local officers who are involved in the strike deprives *elected* officials of their authority and places that authority in an *appointee* of the International. The effective exercise of that authority is, moreover, severely diminished by the limits which Congress has placed on the permissible consequences of union discipline. As we have seen, this was foretold by Professor Cox when Taft-Hartley was passed. Further, in imposing discipline, unions "in all cases must comply with the Landrum-Griffin Act's procedural requirements, rendering impossible the quick response envisioned by the *Eazor* court." (Note, 89 Harv. L. Rev. 601, 608 (1976), omitting a footnote which cites § 101(a)(5) of that Act, 29 U.S.C. § 411(a)(5). See p. 10, *supra*.) None of this is to deny that in some instances union discipline or the threat thereof will have a salutory effect in avoiding or terminating "wild cat" strikes. And if the employer successfully bargains for a promise that the union will use every reasonable means to terminate such a strike, the union should, of course, be held to its promise. But we do say that the contention that such a duty should be *implied* rests on a power relationship which is wholly "illusory." Consider, in addition to the *Eazor* opinion, the following statement of a management advocate of this theory:

Certainly, the 1947 Congress believed that it was a substantial accomplishment when, giving particular attention to no-strike promises, § 301 was enacted to provide, as detailed above, that collective agreements were to be legally enforceable, and that unions would be liable to suit and responsible for their agents. So too, that Congress believed that it was reinforcing a valuable employer sanction when it amended § 13 to confirm the employers' disciplinary power over employees who strike in violation of a no-strike clause. Yet, the evidence negates any suggestion that the Congress contemplated that what it had done would be but an illusion unless the courts were to read into the no-strike promise the duty for which petitioner contends. And surely Chief Judge Parker believed that he was engaging in a meaningful endeavor when, in *Haislip,* he implied a no-strike obligation from a promise to resolve disputes by arbitration, but refused to take the further step of implying an obligation on the union to use all reasonable efforts to end an unauthorized strike.

(C.) In contrast to the general understanding that a union's arbitration promise includes an undertaking not to authorize a strike over an arbitrable issue which governed the result in *Lucas Flour* and *Haislip,* it has not been understood that an arbitration or no-strike clause is an undertaking to use all reasonable means to end unauthorized strikes. For "the context in which the parties bargained and the

A concept of broad union responsibility—perhaps bordering upon an insurer or guarantor type of liability—would not appear to place an undue burden upon the one party which has the power and ability to demand of employees strict compliance with the collective bargaining agreement. [Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions,* 25 Lab.L.J. 592, 610-611 (Sept. 1973).]

basic regulatory scheme underlying that context,"[33] specifically, the decisions made by Congress in 1947 lead straight to *Haislip's* further holding which the court below properly followed here:

> There is nothing in the contract making defendants liable for "wild cat" strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in "wild cat" strikes lose the protection of the [National Labor Relations] Act and may be discharged by their employers with impunity for so doing. N.L.R.B. v. Draper Corporation, 4 Cir., 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If Morris and Belcher had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. *The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike.*[34]

In sharp contrast, the ultimate rationale of the *Eazor* line of cases as restated in the conclusion of the opinion in *Republic Steel Corp.* v. *U.M.W. of America,* 570 F.2d 467, 479 (C.A.3) does not rest on the complex of legislative policies and their adjustment that informs the Taft-Hartley Act but on the Third Circuit's own policy judgments:

> Our holding that the International may be liable is mandated by the public interest. The International un-

[33] Cf. *NLRB* v. *C & C Plywood Co.,* 385 U.S. 421, 430.

[34] 223 F.2d at 877-878, emphasis added.

> ion simply must bear certain obligations if it is to continue to be entitled to the rights and benefits accorded by our national labor policy. To the extent that any union—local, district, or international; craft, industrial, or independent—refuses to enforce appropriately authorized union discipline upon recalcitrant members who violate either collective bargaining agreements or internal by-laws of the union that union can be said to have abrogated a proportion of valued rights granted to the union under our national labor policy.

With this imperious statement of the obligations "union[s] simply must bear * * * to be entitled to the rights and benefits accorded by our national labor policy" the Court of Appeals has taken leave of the judicial realm and entered that already occupied by the legislature which affirmed those rights—"which are fundamental" (*Jones & Laughlin, supra,* 301 U.S. at 33)—and did not so condition them. We submit that the Third Circuit has engaged in precisely that "free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements" [35] against which this Court forcefully admonished in *Howard Johnson.*

CONCLUSION

For the above stated reasons the aspect of the decision below before this Court should be affirmed.

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[34] 417 U.S. at 255.